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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

VALERIE BAZYLEVICH, a Minor, etc., et al., Plaintiffs and Appellants, v. BRAEMAR COUNTRY CLUB, Defendant and Respondent.	B280797 (Los Angeles County Super. Ct. No. BC548751)

APPEAL from an order of the Superior Court of Los Angeles County, Elizabeth Lippitt, Judge. Reversed.

Law Offices of Haik Beloryan and Haik Beloryan for Plaintiffs and Appellants.

Manning & Kass, Ellrod, Ramirez, Trester, Louis W. Pappas, Steven J. Renick, and Marilyn R. Victor for Defendant and Respondent.

Svetlana Bykova, individually, and as the guardian ad litem for Valerie Bazylevich (collectively plaintiffs),[1] appeal the summary judgment of their negligence action in favor of defendant Braemar Country Club (Braemar). Plaintiffs' action alleges Braemar negligently failed to maintain its pool area in a safe condition and/or to provide adequate lifeguard surveillance, and that such negligence caused Bykova's two-year-old daughter Valerie, who fell into the pool, to stop breathing for an undetermined period of time until revived through CPR. Plaintiffs' action seeks recovery for Valerie's physical and mental trauma, as well as Bykova's own emotional distress from witnessing part of the incident.

On appeal, plaintiffs argue that the trial court erred when it concluded the liability waiver Bykova signed as part of her Braemar membership application bars plaintiffs' claims. Civil Code section 1668 renders a waiver unenforceable against claims seeking recovery for harm caused by gross negligence or statutory violations. Plaintiffs contend they are seeking recovery for harm proximately caused by Braemar's purported gross negligence, Health and Safety Code violations, and regulatory violations, and thus that Bykova's waiver is unenforceable against plaintiffs' claims. Braemar bears the burden on summary judgment of showing there is no triable issue as to whether the waiver is enforceable. Viewing the evidence in the light most favorable to plaintiffs, and bearing in mind that a defendant seeking summary judgment must make some affirmative showing to establish that plaintiffs have not offered and cannot reasonably expect to marshal

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[1] Svetlana Bykova is the mother of Valerie Bazylevich. Although we will refer to these individuals collectively as plaintiffs, to avoid confusion, we will refer to them individually as Bykova and Valerie.

necessary evidence, we conclude that Braemar has failed to meet its burden. The record presents a triable issue as to whether Braemar violated Health and Safety Code section 116045[2] by failing to assure a lifeguard was consistently present on the day in question, and whether any such code violation caused Valerie's injuries.[3] This is sufficient for us to conclude the trial court erred in granting summary judgment based on waiver, and we need not address the other ways in which plaintiffs argue the waiver might be unenforceable under Civil Code section 1668.

Plaintiffs also argue the trial court erred in concluding that summary judgment was appropriate under the primary assumption of risk doctrine. We agree. A triable issue exists as to whether Braemar engaged in conduct, such as failing to provide continuous lifeguard supervision of a crowded pool area, that increased the risks inherent in swimming.

Finally, Bykova's individual claim for bystander negligent infliction of emotional distress (NIED) should not be summarily adjudicated on the basis Braemar raised below. Even if Braemar is correct that plaintiffs are judicially estopped from presenting evidence that Bykova recognized Valerie when Bykova first saw the child floating in the pool, this would not defeat Bykova's claim. Bystander NIED liability requires that the bystander was aware that a close relative was being injured *during the alleged injury-inflicting conduct*. Here, the injury-inflicting conduct plaintiffs

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[2] Unless otherwise specified, statutory references are to the Health and Safety Code.

[3] The trial court thus also erred in granting summary judgment on the alternative basis that there is no triable issue of fact regarding causation.

allege includes Braemar lifeguards' purportedly deficient response to Valerie's falling into the pool. Such response only concluded when Valerie was resuscitated, and there is uncontested evidence that Bykova knew before that point that Valerie was the victim.

Accordingly, we reverse the judgment. We need not address plaintiffs' argument that the court improperly excluded the expert declaration of aquatic consultant Dr. Alison Osinski. In light of our decision to reverse the court's order granting that motion on other grounds, Bykova's evidentiary argument is moot.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Bykova's Membership at Braemar and Liability Release*

Bykova applied to become a member of Braemar in 2010, in connection with which she signed a membership application containing the following language on the signature page in a capitalized bold font: "I/We hereby fully release and discharge [Braemar], its employees, agents, shareholders, members, managers, affiliates and assigns from any liability, injury, loss, damage or claim arising from my/our use of [Braemar's] facilities." (Boldface and capitalization omitted.) By signing the application, Bykova further agreed "to conform to and be bound by . . . the Bylaws, the Rules and Regulations, and written membership policies of [Braemar]." Both the bylaws and the rules and regulations contain releases of liability for any injuries suffered while using Braemar's facilities. Plaintiffs dispute that Bykova received these documents, but admits Bykova signed the application indicating she had received them.

B. *June 16, 2012 Incident at the Braemar Pool*

Bykova was a member of Braemar when, on June 16, 2012, she attended a birthday party at the Braemar pool with her then two-year-old daughter, Valerie. Also in attendance were Bykova's eight-year-old daughter, Valerie's father, and a family friend and her children. Posted signs at the pool area indicated that the maximum capacity for the pool area was 160 people, and that the maximum bather capacity was 110 people. Bykova testified that, during the party, between 100 and 200 individuals were in and around the pool, at least 100 of whom were in the pool. Another witness testified that there were around 100 to 120 individuals in and around the pool, which he described as "packed." At least one lifeguard was on duty and present in the pool area, though there is conflicting evidence regarding where the lifeguard or lifeguards were and what they were doing at or around the time of the incident. During discovery, Braemar was unable to produce records regarding which lifeguards were on duty on the day in question or the exact duration of their shifts and breaks.

Valerie wore "floaties" while in the pool, as she could not swim unassisted. Bykova removed Valerie's floaties while the group ate lunch at a table behind the rows of poolside lounge chairs. After lunch, Bykova left Valerie and Valerie's eight-year-old sister seated on separate lounge chairs next to the pool eating ice cream, and returned to the table to clean up. The lounge chairs were placed less than four feet away from the pool's edge, in violation of Braemar's policies. When Bykova returned, Valerie was no longer on the lounge chair, Valerie's sister did not know where Valerie had gone, and Valerie's ice cream was on the ground.

Bykova then saw a child floating facedown and motionless in the pool. Plaintiffs' unverified first amended complaint alleged

that Bykova did not recognize the child as Valerie until she was out of the water. In her unverified second amended complaint and deposition testimony, however, Bykova stated she immediately knew the child was Valerie based on the bathing suit the child was wearing.

Fortunately, Valerie was rescued from the water and resuscitated. The witnesses provide conflicting accounts as to how this occurred. Bykova testified that she jumped into the water, pulled her daughter out, and attempted to perform CPR. She further testified that she did not see a lifeguard in the lifeguard tower at the time she jumped in the pool.

Chelsea Golub, a Braemar lifeguard, testified that she was in the lifeguard tower when she first observed Valerie floating facedown in the pool. Golub testified that she jumped in to assist, but Bykova reached Valerie first and pulled the child out of the water.

Theodore Melfi, a guest at the pool, testified that a male lifeguard pulled Valerie out of the pool, and that a male and female lifeguard began CPR efforts on Valerie before a doctor took over.

Dr. Glen Aquino, a physician and guest at the pool, testified that he saw Bykova pull her daughter out of the water, and that he performed CPR and chest compressions on Valerie. Dr. Aquino initially informed Bykova that Valerie was not breathing and had no pulse. After two to four minutes of CPR, Valerie vomited, began breathing unassisted, and regained a pulse. Bykova estimates Valerie was underwater between 30 seconds and two minutes, based solely on the amount of time Bykova left Valerie alone, as well as Bykova's understanding that it is not possible to resuscitate someone who has been underwater longer than two minutes.

Bykova testified during her deposition that, approximately 48 hours after the incident, Valerie told Bykova that she "was

pushed by a kid who was running and pushed the chair, and the chair push[ed] her into the water." In her written responses to special interrogatories, Bykova stated that "Valerie recall[ed] coming into contact with a chaise that was pushed onto her by another child running moments before her fall into the pool." (Capitalization omitted.) The record does not contain testimony of any witness purporting to have seen how Valerie got into the pool, or to have seen her struggling in the pool before non-fatally drowning.[4]

C. *Motion for Summary Judgment and Osinski Expert Declaration*

Plaintiffs filed suit against Braemar based on the June 16, 2012 incident, both in Bykova's individual capacity and on behalf of Valerie. In their second amended complaint, plaintiffs assert three causes of action: general negligence, premises liability, and NIED.

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[4] The parties disagree as to the proper use of the term "drowning." Braemar appears to use the term as carrying the colloquial meaning that implies death from submersion in water, and therefore, refers to Valerie's accident as involving a "*near*-drowning." Plaintiffs take issue with this language, apparently employing the literal definition of "drowning," which does not require a resulting death, but rather, "suffocat[ion] by submersion esp[ecially] in water," with "suffocate" defined as "to stop the respiration of [or] . . . to deprive of oxygen." (Webster's 9th New Collegiate Dict. (1986) pp. 385, 1179.) The evidence is undisputed that Valerie did indeed "stop respiration" after being submerged in water. For the sake of clarity, we will employ this dictionary definition and refer to Valerie's accident as involving a "non-fatal drowning."

Braemar moved for summary judgment and, in the alternative, summary adjudication of plaintiffs' NIED cause of action. As to all causes of action, Braemar argued that plaintiffs' claims were barred by the waiver of liability Bykova had signed when she became a member of Braemar, and that plaintiffs had failed to offer any proof of causation. As to the NIED claim, Braemar argued plaintiffs could not establish a necessary element of their NIED claim, because plaintiffs "admitted" in a previous version of their complaint that Bykova did not recognize Valerie while the child was drowning.

In opposing the motion, plaintiffs offered the declaration of Dr. Alison Osinski, an "aquatics consultant," who opined on the "standard of care and causation." (Boldface and capitalization omitted.) Osinski relied on several sources of information in reaching her opinions, including Bykova's testimony relaying Valerie's description of how she fell into the pool. Osinski appears to have accepted this description as accurate and true, as her declaration proceeds from the premise that "Valerie was knocked or pushed into the pool by a boy who was running on the deck," and does not address the possibility that Valerie could have jumped into the pool.

Osinski further opined that the state of the pool area, as well as what she views as the lack of "reasonably trained lifeguards" "properly stationed and watching, surveying, and scanning the pool at the time of the incident," proximately caused Valerie to "fall[] or be[] pushed into the pool," and thereafter to "submerge[] under the water . . . remain[] submerged under the water until she went into a state of unconsciousness and hypoxic convulsions . . . go[] into the post aspiration stage of drowning . . . [and] hav[e] to receive CPR for the lengthy duration of time that she did after she was taken out of the pool."

Braemar objected to Osinski's declaration on the basis that it lacked foundation in various respects, including to the extent it relied on Valerie's account of the incident as relayed in Bykova's testimony. Braemar also raised a hearsay objection to Bykova's testimony describing Valerie's statements about the incident.

D. *Trial Court's Summary Judgment Decision and Related Evidentiary Rulings*

The court held a hearing on Braemar's summary judgment motion, at which it sustained Braemar's objections to the Osinski declaration based on lack of foundation. The court overruled Braemar's hearsay objection to Bykova's testimony regarding Valerie's statements, noting that these objections were "unintelligible an[d] not in proper format." The court granted summary judgment, and thus did not need to explicitly address Braemar's alternative request for summary adjudication of plaintiffs' NIED claim.

The court concluded that there was no triable issue as to whether Bykova signed the liability waiver, or whether the waiver was enforceable against the claims at issue. The court went on to note that summary judgment would be appropriate even without the waiver, because there was no triable issue of material fact with respect to causation, as no evidence connected Braemar's conduct with Valerie's accident. The court further noted that "there is no evidence that the outcome would have been different," had the lifeguards reacted differently to the accident, because—fortunately—Valerie was resuscitated and did not suffer any permanent injury. Finally, the court concluded that summary judgment was also appropriate under the assumption of risk doctrine.

The court entered judgment in favor of Braemar. Plaintiffs filed a timely notice of appeal.

DISCUSSION

A. *Summary Judgment and Standard of Review*

The issues a trial court considers in reviewing a motion for summary judgment are defined by the pleadings. (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 876–877 (*Anderson*).) "As to each claim as framed by the complaint, ' " 'the motion must respond by establishing a complete defense or otherwise showing there is no factual basis for relief on any theory reasonably contemplated by the opponent's pleading.' " ' " (*Ibid.*, quoting *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 848 (*Eriksson*).)

Appellate courts review the grant of a motion for summary judgment de novo. (*Anderson, supra*, 4 Cal.App.5th at pp. 876-877.) We conduct an independent review of the record, during which we must " 'liberally construe the evidence in support of the party opposing summary judgment and resolve doubts concerning the evidence in favor of that party.' " (*Ennabe v. Manosa* (2014) 58 Cal.4th 697, 705.) We may consider "all the evidence set forth in the moving and opposition papers, except evidence to which objections were made and sustained by the trial court, and all inferences reasonably drawn from the evidence." (*Anderson, supra*, 4 Cal.App.5th at pp. 876–877.)

B. *No Triable Issue Exists Regarding Whether Bykova Signed a Waiver of the Claims at Issue*

In order for Braemar to prevail at summary judgment based on waiver, Braemar must establish that there is no triable issue of fact as to whether Bykova released the claims at issue. (See *Eriksson, supra*, 191 Cal.App.4th at p. 848.) Plaintiffs do not

dispute that Bykova signed the membership application, but rather deny that Bykova was aware the application contained a waiver and release of liability. "[I]n the absence of fraud, overreaching or excusable neglect, . . . one who signs an instrument may not avoid the impact of its terms on the ground that he failed to read the instrument before signing it." (*Hulsey v. Elsinore Parachute Center* (1985) 168 Cal.App.3d 333, 339.) The waiver is thus valid.

Plaintiffs do not dispute that their claims fall within the scope of the waiver, because they are "reasonably related to the object or purpose for which the release was given." (See *Benedek v. PLC Santa Monica* (2002) 104 Cal.App.4th 1351, 1361.) Thus, "[b]ased on th[e] clear and explicit language [of the membership application waiver], [Bykova] assumed responsibility for the risks arising from [her and Valerie's] use of [Braemar's] facilities, services, equipment, or premises." (*Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 638.)

C. *A Triable Issue Exists Regarding Whether the Waiver is Enforceable and Bars Plaintiffs' Claims*

Civil Code section 1668 renders unenforceable agreements that "directly or indirectly . . . exempt anyone from responsibility for his own . . . violation of law, whether willful or negligent." (Civ. Code, § 1668 [such agreements against public policy]; see *Halliday v. Greene* (1966) 244 Cal.App.2d 482, 488.) Courts have applied Civil Code section 1668 to invalidate the release of claims alleging that either gross negligence or a statutory violation "proximate[ly] cause[d]" the plaintiff's injury. (See *Hanna v. Lederman* (1963) 223 Cal.App.2d 786, 792 (*Hanna*) ["[s]ince the claim for damages because of negligence . . . was predicated upon the alleged violation of section 94.30312 of the Municipal Code, the exculpatory provision could not be a defense to that cause of

action *if the evidence showed such violation to be a proximate cause of the tenant's loss*"], italics added; see also *Capri v. L.A. Fitness International, LLC* (2006) 136 Cal.App.4th 1078, 1085–1086 [relying on *Hanna* to bar application of waiver to claims alleging health club's statutory violation caused plaintiff's injury]; *Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1082 [addressing application of waiver to gross negligence claim].)

At the summary judgment stage, however, plaintiffs do not bear the burden of establishing their claims meet these criteria. (See *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 780, fn. 58.) Rather, to support summary judgment based on waiver, "the defendant bears the burden of raising the defense and establishing the validity of a release." (*Ibid.*) Accordingly, a defendant must "negate[] . . . material factual allegations" that would prevent a waiver from providing a basis for summary judgment—such as factual allegations reflecting gross negligence or statutory violations causing the claimed injury. (*Eriksson, supra*, 191 Cal.App.4th at p. 856.)

Exactly *how* a defendant may meet this burden is crucial to our analysis in this case. Under Code of Civil Procedure section 437c, a defendant may satisfy its burden on summary judgment by showing that "[o]ne or more of the elements of the cause of action . . . *cannot* be separately established" by the plaintiff. (Code Civ. Proc. § 437c, subd. (o)(1), italics added.) But this "continues to require a defendant moving for summary judgment to present evidence, and not simply point out that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 854 (*Aguilar*); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 373–374 (*Guz*) [a " 'defendant must make an *affirmative* showing in support of his or her motion' " based on plaintiff's inability to

produce necessary evidence consisting of " 'direct or circumstantial evidence that the plaintiff not only does not have but cannot reasonably expect to obtain a prima facie case' "].) Put differently, although a defendant may satisfy its burden on summary judgment based on an irreparable deficiency in plaintiff's evidence, the defendant may not simply identify such a deficiency and declare it irreparable; rather, the defendant must make an affirmative evidentiary showing that establishes plaintiff's inability to marshal the needed evidence. Such evidence a defendant may offer could include, for example, "admissions by the plaintiff following extensive discovery to the effect that he has discovered nothing." (*Aguilar, supra,* 25 Cal.4th at p. 855.)

Plaintiffs argue on appeal that a triable issue exists as to whether, on the day in question, Braemar violated, inter alia, section 116045, and whether such violation proximately caused Valerie's injuries, thereby triggering Civil Code section 1668. Section 116045 requires that "[l]ifeguard service . . . be provided for any public swimming pool that is of wholly artificial construction and for the use of which a direct fee is charged," or, for such pools that do not charge a direct fee, that either lifeguard service be provided or a sign be posted indicating no lifeguard is on duty. (§ 116045, subd. (a); see *id.*, subd. (e) [defining a "direct fee" as a "separately stated fee or charge for the use of a public swimming pool to the exclusion of any other service, facility, or amenity"].) Braemar did not produce any records suggesting that lifeguards were on duty at all times on the day in question. Witness testimony also does not conclusively resolve the issue: Although Golub testified that she was in the lifeguard tower at the pool at the time Valerie was floating in the water, Bykova testified that the tower was unmanned at or around that same time. Viewing the evidence in the light most favorable to plaintiffs,

we conclude this is sufficient to create a triable issue of fact as to whether, on the day in question, Braemar complied with the section 116045 requirement that lifeguards supervise the pool at all times.[5]

Even assuming such a statutory violation occurred, however, if it did not also cause the injuries plaintiffs allege, Bykova's waiver is still enforceable against plaintiffs' claims. Thus, notwithstanding the triable issue of fact that exists regarding a possible section 116045 violation, Braemar still may prevail on summary judgment based on waiver if Braemar can negate the possibility of a causal link between any section 116045 violation and plaintiffs' injuries. To do so, Braemar notes the insufficiency of plaintiffs' evidence on causation, but has not made an "affirmative showing" that plaintiffs "cannot reasonably expect to obtain" evidence supporting a causal connection between a lack of lifeguard surveillance and Valerie's injury. (*Guz, supra*, 24 Cal.4th at pp. 373–374; see *Aguilar, supra*, 25 Cal.4th at p. 854.) Rather, Braemar merely "point[s] out that [plaintiffs do] not possess" such evidence. (*Ibid.*) The California Supreme Court has clarified that this alone is not enough.

Braemar urges that, as in *Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763 (*Saelzler*), the facts available simply cannot provide a non-speculative basis for an expert or jury to find it more likely that a lack of lifeguard supervision—as opposed to one of several other "foreseeable" possible causes equally supported by

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[5] Because we conclude a triable issue exists regarding whether Braemar violated section 116045, we need not address plaintiffs' arguments that Braemar's conduct also violated section 116040, as well as California Code of Regulations, title 22, section 65539, subdivision (b).

the evidence—led to Valerie's injuries. (*Id.* at pp. 778 & 766-767.) *Saelzler* involved a premises liability claim by a woman assaulted in an apartment building based on the defendant building owner's failure to take more security measures in response to previous instances of crime and violence. Crucial to the holding in *Saelzler*, however, was that the identities of the assailants were unknown, such that plaintiff had no way of determining whether those unknown assailants had gained access to the property because of insufficient security, rather than, for example, because they were residents or friends of a resident. (See *id.* at pp. 766-767 & 776-777.) The court rejected the idea that expert testimony might provide the otherwise lacking causation evidence because any expert would be "equally unaware" of the assailants' identities, and thus the expert could have no non-speculative basis for a causation opinion. (*Id.* at p. 781.) In this way, the defendant in *Saelzler* had shown "through evidence adduced in [the] case," that the plaintiff "ha[d] not established *and cannot reasonably expect to*" gather evidence supporting prima facie causation. (*Id.* at pp. 768-769, italics added.)

Here, by contrast, Braemar has made no affirmative evidentiary showing regarding plaintiffs' ability to marshal causation evidence. And although the record on summary judgment offers little that might inform a jury or expert's conclusion regarding causation, there is not the same complete lack of crucial information present in *Saelzler* that conclusively prevents such a conclusion. Evidence regarding how Valerie fell into the pool is inherently limited based on the lack of witnesses to the fall, but this does not prevent plaintiffs from establishing that Braemar's conduct in the several minutes following that fall

proximately caused Valerie to remain in the pool long enough to non-fatally drown.[6] Put differently, even if "[t]he probabilities are evenly balanced as to whether" Valerie fell into the pool as a result of Braemar's conduct, as opposed to as a result of other potential causes equally supported by the record, Braemar has not shown that plaintiffs cannot provide the necessary evidence of causation. (Cf. *Padilla v. Rodas* (2008) 160 Cal.App.4th 742, 752-753 (*Padilla*) [summary judgment for defendant appropriate where no evidence suggested how child gained access to pool in which he fatally drowned, such that the evidence made it equally probable that the child utilized the gate negligently left open and that he gained access by some other means].) Braemar has offered no "evidence that the harm could have occurred even in the absence of the defendant's negligence." (*Ibid.*)

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[6] At oral argument before this court, plaintiffs' counsel suggested that causation might be established via additional medical expert testimony. (See *Anderson, supra*, 4 Cal.App.5th at pp. 884 & 880–882 [where plaintiff failed to offer evidence of gross negligence and "did not argue before the trial court, or even on appeal, that he could have alleged sufficient facts or produced evidence to raise a triable issue" regarding gross negligence, defendant had satisfied its burden of establishing Civil Code section 1668 did not preclude summary judgment of claims based on valid waiver], italics omitted.)

Viewing the record in the light most favorable to plaintiffs, Braemar has failed to make the requisite affirmative showing that plaintiffs have not and *cannot* offer evidence that Braemar violated section 116045, and that such violation caused Valerie's injury. Thus, a triable issue exists as to whether the waiver is enforceable under Civil Code section 1668.[7]

D. *A Triable Issue Exists as to Primary Assumption of Risk*

Plaintiffs argue the court erred in concluding that the primary assumption of risk doctrine provides an additional basis for granting summary judgment in Braemar's favor. The primary assumption of risk doctrine derives from the idea that "some activities—and, specifically, many sports—are inherently dangerous," such that "[i]mposing a duty to mitigate those inherent dangers could alter the nature of the activity or inhibit vigorous participation." (*Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1003 (*Kahn*).) Thus, the general duty of reasonable care prescribed by the Civil Code notwithstanding, (see Civ. Code, § 1714), defendants do not have a duty to protect against "the risks inherent in [a] sport, or to eliminate risk from the sport," but instead have a "duty not to increase the risk of harm beyond what is inherent in the sport." (*Kahn, supra*, 31 Cal.4th at p. 1004.)

While drowning is a risk inherent in swimming, a failure to provide lifeguard supervision at a public pool (or post signs warning

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[7] Because Braemar never shifted to plaintiffs the burden of producing evidence, the trial court's conclusion that Osinski's opinions lacked foundation and cannot support causation is immaterial to our decision. Whether any opinions Osinski may offer at trial are admissible and support causation is a question for the trial judge on another day.

of the lack of such supervision) increases that risk. Indeed, this is the policy underlying the lifeguard surveillance requirement under section 116045. (See *Haft v. Lone Palm Hotel* (1970) 3 Cal.3d 756, 774–775.) Based on our conclusion that a triable issue exists as to whether Braemar staffed its pool with lifeguards without interruption during the relevant time period, and viewing all other evidence regarding the pool conditions on that day in the light most favorable to plaintiffs, we conclude that a triable issue of fact exists as to whether Braemar increased the risks inherent in utilizing its pool facilities and thereby breached its duty of care.

E. *NIED Claim*

Braemar's motion below sought, as an alternative to summary judgment of all claims, summary adjudication of plaintiffs' bystander NIED claim. Such a claim requires Bykova to prove she "(1) is closely related to the injury victim, (2) [was] present at the scene of the injury-producing event at the time it occurr[ed] and [was] then aware that it is causing injury to the victim and, (3) as a result suffer[ed] emotional distress beyond that which would be anticipated in a disinterested witness." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647.) "[S]omeone who hears an accident but does not then know it is causing injury to a relative does not have a viable claim for NIED, even if the missing knowledge is acquired moments later." (*Bird v. Saenz* (2002) 28 Cal.4th 910, 917, fn. 3.) Braemar argued that no triable issue existed as to Bykova's awareness of the injury-producing conduct at the time it was occurring.[8] Specifically, Braemar contended

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[8] Plaintiffs assume that the court agreed with Braemar's NIED argument, even though the trial court did not address the argument in its written decision. Our record on appeal does not

plaintiffs' allegation in the first amended complaint that Bykova did not recognize Valerie when Bykova saw the child floating in the pool constitutes a judicial admission on the issue, and precludes subsequent allegations and testimony to the contrary. According to Braemar, "the injury-producing event here was [Valerie] falling into the pool, so once she was out of the pool, the event was over."

But this is not what plaintiffs allege, nor what is necessarily so based on the evidence in the record. Plaintiffs' theory of the case is that the injury-producing event was not only Valerie's fall, but alleged shortcomings in the lifeguards' response to her fall, which—viewing the evidence in the light most favorable to plaintiffs' claims—could have continued to contribute to Valerie's injury until she was fully resuscitated. Thus, even if Bykova's allegation in the first amended complaint is a judicial admission regarding when Bykova recognized Valerie—and we do not decide whether it is—there remains a triable issue of fact whether Bykova is entitled to

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contain the transcript for the motion hearing, nor does either party represent that the court spoke to this argument at that hearing. There is thus no basis in the record for plaintiffs' assumption, given that Braemar's waiver, causation, and assumption of risk arguments, which the trial court accepted, were sufficient to defeat all claims, including NIED. Nevertheless, "[w]e are not bound by the issues actually decided by the trial court." (*Schmidt v. Bank of America, N.A.* (2014) 223 Cal.App.4th 1489, 1498.) The parties have briefed the NIED issue both below and before this court. (See Code Civ. Proc., § 437c, subd. (m)(2) ["Before a reviewing court affirms an order granting summary judgment or summary adjudication on a ground not relied upon by the trial court, the reviewing court shall afford the parties an opportunity to present their views on the issue by submitting supplemental briefs."].) Therefore, we may—and in the interest of judicial efficiency, we do—consider the issue.

compensation for any emotional distress she may have suffered as a bystander witnessing her daughter suffer injury inflicted after the fall.

DISPOSITION

The judgment is reversed. The trial court is directed to vacate its order granting summary judgment and enter a different order denying Braemar's motion for summary judgment and its alternative motion for summary adjudication.

The parties shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

BENDIX, J.